From what was stated in his affidavit, I found that it was not through his negligence that the judgment was obtained against him. I also find that the conduct of the applicant was at all times bona fide. Finally I find no unreasonable delay in the filing of the application to set aside the judgment in default in view of the circumstances in this case.

Apart from the question of delay, Mr Chandran also submitted that there was nothing in the applicant's affidavit in support of the application that contained an explanation as to why no action was taken from the date of service to the date of judgment. He added that no good reasons were given as to why appearance was not entered. He further submitted that the fourth defendant had not come before this court with clean hands. In support of his submission, he again cited the *Hong Leong* case.[7] In *Evans* v *Bartlam*,[9] Lord Atkin emphasized, at p 480 of his judgment, that there was no rule that the applicant must satisfy the court that there was a reasonable explanation why judgment was allowed to go by default. But whatever reason, if any, for allowing judgment and thereafter applying to set it aside, was one of the matters to which the court would have regard in exercising its discretion to set aside judgment in default. In my opinion, if the applicant failed to give an explanation why he neglected to enter appearance, such failure should not be a ground to dismiss his application. The court may, however, order him to pay costs. In *Evans* v *Bartlam*,[9] Lord Wright, in his judgment at p 489 said: 'The court might also have regard to the applicant's explanation why he neglected to appear after being served, though as a rule *his fault (if any) in that respect can be sufficiently punished by the terms as to costs* or otherwise which the court in its discretion is empowered by the rule to impose.' (emphasis added). Recently, the English Court of Appeal decided that where a defendant who deliberately misled the court by lying about the reason for not defending an action, he was nevertheless entitled to have the judgment in default of appearance set aside because he was able to show that there were triable issues arising out of the plaintiff's claim. The court, however, allowed him to defend the action on stringent conditions as to his paying security and paying costs (see *Vann* v *Awford & Others*[11]).

From the applicant's affidavit in support of the application, I was satisfied that he had a valid explanation as to why appearance was not entered after the writ was served on him. His conduct was very prompt and it was not his fault that appearance was not entered. He should not, therefore, be asked to pay costs. On the other hand, since the judgment was an irregular judgment, it was the plaintiff who should pay the costs.

For the reasons stated above, I confirmed the order I made in chambers on 12 December 1986 and ordered that the plaintiff pay the applicant the costs of further argument.

Order accordingly.

Solicitors: *Adnan Sundra & Low*; *Ng Ek Teong & Partners*.

Reported by *Ng Sheau Jiuan*

Sugumar Balakrishnan v The Chief Minister of the State of Sabah

HIGH COURT (KOTA KINABALU) – ORIGINATING MOTION NO 20 OF 1987
ABU MANSOR J
11 DECEMBER 1987

Administrative Law – Prohibitory order – Leave to apply for – Application for – Power of state authority to publish in federal gazette – Whether prohibitory order can be issued against state authority – Whether leave should be granted if substantive motion is bound to fail – Rules of the High Court 1980, O 53 – Government Proceedings Ordinance 1956, s 29(2) – Immigration and Passport (Exemption) (Non-Application of Exemption) (Sabah) Order 1984, para 2

The applicant, by an ex parte notice of motion, applied for an order that leave be granted under O 53 of the Rules of the High Court 1980 to apply for an order of prohibition to prohibit the respondent from publishing in the federal gazette, pursuant to para 2 of the Immigration and Passport (Exemption) (Non-Application of Exemption) (Sabah) Order 1984, a notification to the effect that the Immigration and Passport (Exemption) Order 1984 shall not apply to the applicant. If allowed to be published, the notification would mean that the applicant can only enter Sabah using a proper passport whereas under the Immigration and Passport (Exemption) Order 1984 he had enjoyed the privilege of entering Sabah by producing only his national registration card.

Held, dismissing the application: (1) Paragraph 2 of the Immigration and Passport (Exemption) (Non-Application of Exemption) (Sabah) Order 1984 speaks of the power being the power of the state authority to publish in the federal gazette. The applicant's action is in truth against the state authority or the state government of Sabah.

(2) Section 29(2) of the Government Proceedings Ordinance 1956 governs the power of the court to issue a prohibition against the government. Under s 29(2), it is clear that the court is precluded from granting the order of prohibition as the effect of granting such an order against the present respondent would be the same as if granting it against the state authority or the state government.

(3) The granting of the application for leave to apply for an order of prohibition is within the court's discretion to give. However, if the applicant has no chance of succeeding in his application in the subsequent substantive motion if leave is granted, it is only right and proper that leave be refused to prevent a party being put to unnecessary expense in frivolous or vexatious actions or in continuing an action which was certain to fail.

Cases referred to

1 *Board of Trustees of the Maradana Mosque* v *Baidiuddin Mahmud & Anor* [1967] 1 AC 13 (refd)
2 *JP Berthelsen* v *Director-General of Immigration, Malaysia & Ors* [1987] 1 MLJ 134 (refd)
3 *Metropolitan Properties Co Ltd* v *Lannon & Ors* [1968] 3 All ER 304 (refd)
4 *R Sambasivam* v *Public Services Commission & Anor* [1970] 1 MLJ 61 (refd)
5 *David Anthony* v *PP* [1985] 1 MLJ 453 (refd)
6 *Congreve* v *Home Office* [1976] 1 All ER 697 (refd)
7 *Metropolitan Bank Ltd* v *Pooley* (1884-85) 10 App Cas 210 (refd)
8 *Riches* v *Director of Public Prosecutions* [1973] 1 WLR 1019 (refd)

Legislation referred to

Government Proceedings Ordinance 1956 s 29(2)
Immigration and Passport (Exemption) (Non-Application of Exemption) (Sabah) Order 1984 para 2
Immigration and Passport (Exemption) Order 1984
Rules of the High Court 1980 O 53

Applicant in person.

Cur Adv Vult

Abu Mansor J: By the applicant's ex parte notice of motion dated 10 December 1987, he applied for an order that leave be granted under O 53 of the Rules of the High Court 1980 to apply for an order of prohibition to prohibit the respondent from publishing in the federal gazette a notification to the effect that the Immigration and Passport (Exemption) Order 1984 (PU(A) 270/1984) (hereinafter referred to as the Exemption Order 1984) shall not apply to the applicant pursuant to the Immigration and Passport (Exemption) (Non-Application of Exemption) (Sabah) Order 1984 (PU(A) 343/1984) (hereinafter referred to as the Non-Application of Exemption Order 1984) and also an order that all proceedings in respect of the respondent's intended action be stayed until after hearing of the motion. I heard the applicant on 11 December 1987 and I dismissed the applicant's application for leave. I now give my reason for doing so.

To have a proper perspective it is necessary to set out the background of the present application. The applicant is a Malaysian citizen born in peninsular Malaysia. He is an advocate and solicitor and practises under the name and style of Messrs Sugumar & Co, of which he is the sole proprietor. On 7 December 1987, the applicant was served with a notice from the office of the respondent. The notice asked the applicant to show cause why the state authority may not, pursuant to para 2 of the Non-Application of Exemption Order 1984, publish in the federal gazette that the Exemption Order 1984 may not apply to the applicant, the effect of which would be that the applicant may not but can only enter Sabah, if allowed, by using a proper travel document, ie a proper passport, whereas under the Exemption Order 1984, he had been allowed and had enjoyed the privilege of entering Sabah by producing only his national registration card. The applicant fearing that he may lose this privilege of entry into Sabah by means of this informal mode of entry under the Exemption Order 1984 filed the notice of motion for leave to issue the writ of prohibition on 8 December 1987. The applicant's main intention is to stop the respondent or the state authority in the exercise of his or their intended action under para 2 of that Order which reads:

PU(A) 343

Immigration Act 1959/63
Passport Act 1966

Immigration and Passport (Exemption) (Non-Application of Exemption) (Sabah) Order 1984

Act 155 Act 150

In exercise of the powers conferred by s 55 of the Immigration Act 1959/63 and s 4 of the Passport Act 1966, the Minister, with the concurrence of the state authority of Sabah, makes the following order:

Citation

1 This order may be cited as the Immigration and Passport (Exemption) (Non-Application of Exemption) (Sabah) Order 1984.

Non-application of Immigration and Passport (Exemption) Order 1984 to specified persons. PU(A) 270/84

The Immigration and Passport (Exemption) Order 1984 in its application to the State of Sabah shall not apply to any person or class of persons specified in a notification in the Federal Gazette by the State Authority of Sabah from time to time.

Made 20 September 1984.
(KDN S 100/215/I; PN (PU) 100/III)

sgd: Dato Musa Hitam
Minister for Home Affairs

In his application the applicant cited four grounds. They are that the respondent's intended action was contrary to the rules of natural justice in that no ground or reason has been given in respect of the same, that the respondent's intended action was mala fide, that there was likelihood of bias and, lastly, that the respondent's intended action was an abuse of power being a colourable exercise based on improper purpose and irrelevant considerations.

Touching on the respondent's failure to observe natural justice, the applicant submitted that the absence of grounds was a clear breach of the rules of natural justice and made it difficult for him to make representations. On mala fides, the applicant cited, in para 17 of his affidavit affirmed on 8 December 1987, the 22 instances where he had acted as counsel for clients in bringing suits against the respondent or the state government or state government agencies or members of the Sabah state government. The applicant alleged that it was because he had acted as such counsel that the intended action is

taken against him to deter him from performing his duties as counsel. Then on the allegation that there is a likelihood of bias, the applicant says there is such likelihood by reason of the respondent being the party sued and at the same time having to decide the applicant's fate in the notice to show cause. The applicant also alleged that under the abuse of power contention, the applicant had of late been acting for one client, Haji Laugan Tarki bin Hj Mohd Noor, who had recently made several reports against the respondent and his government members for alleged corruption. The applicant says this notice served on him was with the intention of giving him a warning to desist acting as counsel for Hj Laugan Tarki. The applicant cited a number of relevant authorities on the point which may be pertinent if this action is one for leave to issue certiorari proceedings. Amongst the cases cited was *Board of Trustees of the Maradana Mosque* v *Badiuddin Mahmud & Anor*[1] where the principle of natural justice was infringed when the notice to show cause did not contain sufficient grounds. On the necessity of notice, we were referred to Harry Whitmore and Mark Aronson's *Review of Administrative Action* at p 101 – 'Notice is truly at the heart of natural justice.' Learned counsel also cited the new landmark case of *JP Berthelsen* v *Director General of Immigration, Malaysia & Ors*,[2] saying that the present application was similar in that it is of the forfeiture type. He cited others on the same point which are not necessary to mention. On the ground of bias as infringing natural justice, he cited *Metropolitan Properties Co Ltd* v *Lannon & Ors*,[3] *R Sambasivam* v *Public Service Commission & Anor*[4] and *David Anthony* v *Public Prosecutor*,[5] the ratio of which was that bias need not be actual bias; it was sufficient to show that there was a real likelihood of bias. For the contention that revocation of any licence is to be exercised in accordance with law, learned counsel cited *Congreve* v *Home Office*.[6] With respect I was of the view as I have said, that the authorities cited may be relevant for certiorari but were irrelevant and were of no assistance to answer the issue before me whether at that stage an injunction can be given against the chief minister, a member of the administration or a person acting under the general authority of the state authority. That being the case, I did not consider these authorities cited to me in coming to the decision I finally did. They are irrelevant because there was then no order to quash as the state authority has yet to consider and decide on the applicant's notice to show cause. The applicant, to my mind, misconceived the application and went to submit on the basis as if the respondent had made a decision in this matter.

I then proceeded to consider the relevant question before me whether or not at that stage, I could grant the applicant's application for leave. It is clear that O 53, Rules of the High Court 1980 requiring leave to be granted is to prevent unnecessary applications from being made. I considered that the respondent issued his notice to show cause on 7 December 1987. The notice gave the applicant one week within which to show cause why the Exemption Order 1984 should not apply to the applicant. The applicant filed his application for leave on 8 December 1987 and we heard it on 11 December 1987. It is clear that the respondent or, to be exact, the state authority under that Order has still to decide and make a decision in the matter of the applicant's notice to show cause. Since para 2 of the Non-Application of Exemption Order 1984 speaks of the power being the power of the state authority to publish in the said gazette, in short the applicant's action is in truth against the state authority or the state government of Sabah.

At that stage of the application for leave, can the court issue the required leave? Before we answer that, we need to go a stage further. Assuming the applicant gets leave, would the court in a subsequent notice of motion grant the sought order of prohibition stopping the state authority or the state government from deciding on the matter of the applicant's notice to show cause? Assuming again leave is granted, can the court order stay?

In my view, what governs the power of the court to issue such a prohibition is s 29(2) of the Government Proceedings Ordinance 1956. Section 29 provides:

> 29.(1) In any civil proceedings by or against the government the court shall, subject to the provisions of this Ordinance, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such an appropriate relief as the case may require:
>
> Provided that
>
> (a) where in any proceedings against the government any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties:
>
> (2) The court shall not in any civil proceedings grant any injunction or make any order against an officer of the government if the effect of granting the injunction or making the order would be to give any relief against the government which could not have been obtained in proceedings against the Government.

It is therefore clear to the court that the court is precluded from granting the order of prohibition as the effect of granting such an order against the present respondent would be the same as if granting it against the state authority or the state government which the court is not empowered to give by virtue of sub-s (2) of s 29 thereof.

The granting of the application for leave is within the court's discretion to give. It would be granted if the applicant has some semblance of a chance of succeeding in the substantive motion after leave. The court is of the

view that where the applicant would have no chance of succeeding in his application in the subsequent substantive motion if leave is granted, it is only right and proper that leave be refused to prevent a party being put to unnecessary expense in frivolous or vexatious actions or in continuing an action which was certain to fail (see *Metropolitan Bank Ltd* v *Pooley*[7] and *Riches* v *Director of Public Prosecutions*[8]). For the reason given, I therefore refused leave and I dismissed the applicant's notice of motion. The applicant appeals.

Application dismissed.

Solicitors: *Sugumar & Co.*

Reported by *Ng Sheau Jiuan*

Club Employees Union Selangor v Lake Club

HIGH COURT (KUALA LUMPUR) – CIVIL APPEAL NO R8-16-1-87
VC GEORGE J
9 SEPTEMBER 1987

Administrative Law – Industrial Court award given – Subsequent reference to High Court on certain questions of law – Test to be applied as to whether finding of Industrial Court can be reversed – Dispute on alleged dismissal of swimming instructor from club – Industrial Relations Act 1967, s 33A

The appellant is a union to which K belonged and the respondent was the club whom K worked for. The present case arose out of a dispute between the appellant and the respondent over the alleged dismissal of one K as a swimming instructor by the respondent. The Industrial Court, which heard the dispute in the first instance, held that K's work as a swimming instructor was a contract for service and it accordingly dismissed the appellant's claim that K be reinstated as a swimming instructor. The appellant invoked s 33A of the Industrial Relations Act 1967 and referred certain questions of law to the High Court. The real question in issue is whether K's contract as a swimming instructor was a contract of service or a contract for service.

Held, dismissing the appeal: (1) The question as to whether K's contract as a swimming instructor was a contract of service or a contract for service is inevitably a mixed question of law and fact.

(2) The test to be applied in reviewing the award of the Industrial Court is that stated by Lord Widgery CJ in *Global Plant* v *Secretary of State for Health and Social Security*.[1] The elements of the test are: (a) whether the decision appealed against contained any false proposition of law ex facie (b) whether the decisions reached was supported by no evidence (c) whether the facts found are such that no person, acting judicially and properly instructed as to the relevant law, could come to the decisions arrived at.

(3) Applying the test to the instant case, the chairman's award is not open to attack on any one of the above grounds.

Cases referred to

1 *Global Plant* v *Secretary of State for Health and Social Security* [1971] 3 WLR 269 (folld)
2 *Terrar* v *Minister of Pensions and National Insurance* (unreported) 3 July 1960 (folld)

Legislation referred to

Industrial Relations Act 1967 ss 20, 33A

P Kuppusamy for the appellant.
Cecil Abraham (*LK Peh* (*Miss*) with him) for the respondent.

Cur Adv Vult

VC George J: There was a reference made under s 26(2) of the Industrial Relations Act 1967 arising out of a dispute between the Club Employees Union Selangor and the Lake Club over the alleged dismissal of one Encik P Kommothy as a swimming instructor by the Club with effect from 31 January 1985. The crux of the case was whether Kommothy's work as a swimming instructor was a contract of service or a contract for service. The reference was duly heard by a chairman of the Industrial Court, Dato Wong Cheng Wee, who handed down his award on 26 May 1986.

He held that the work as a swimming instructor was a contract for service and he accordingly dismissed the Union's claim that Kommothy be reinstated as a swimming instructor.

The Union invoked s 33A of the Industrial Relations Act 1967 and sought to have a number of questions which they said were questions of law that ought to be referred to the High Court be referred to the High Court. Pursuant to the application, three of the questions were referred to the High Court as being questions of law which arose in the course of the proceedings suitable for reference to the High Court.

Encik Kommothy had initially joined the Club as a lifeguard on 1 October 1973 – ten years later, on 1 September 1983 he was promoted as a pool supervisor. Apparently, there was a collective agreement between the Union and the Club in respect of workers employed by the Club and the positions of lifeguard and pool supervisor specifically came within the categories of workers specified under the collective agreement. Swimming instructors or coaches did not.

Now, while Encik Kommothy was still a lifeguard, the pool supervisor was one Encik Sharif who apparently also functioned as a swimming instructor or coach giving lessons to members and the children of members at the swimming pool of the Club. This proved to be a lucrative side-line with the pool supervisor obtaining for it amounts greater than his salary as pool supervisor.

On or about 12 June 1980, Encik Kommothy wrote to the Club, extracts from which letter the chairman has referred to in his award thus: